Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL MESSINO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an error impairing a defendant's exercise of peremptory challenges requires reversal without any inquiry into whether the error was harmless under 28 U.S.C. 2111 and Rule 52(a) of the Federal Rules of Criminal Procedure, which direct courts to disregard errors that do not "affect the substantial rights" of the defendant.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 122 F.3d 389. The opinion on denial of rehearing en banc (App., *infra*, 27a-41a) is reported at 130 F.3d 1225.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1997. A petition for rehearing was denied on November 21, 1997. On February 10, 1998, Justice Stevens extended the time within which to file a peti-

tion for a writ of certiorari to and including March 23, 1998. On March 18, 1998, Justice Stevens granted a further extension of time to and including April 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

Section 2111 of Title 28 of the United States Code provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors which do not affect the substantial rights of the parties."

Rule 24(b) of the Federal Rules of Criminal Procedure provides:

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Rule 52(a) of the Federal Rules of Criminal Procedure provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

STATEMENT

Respondents, Paul Messino, Christopher B. Messino (Christopher), Christopher Richard Messino (Richard), and Clement Messino, were found guilty of drug conspiracy and related charges after a ten-week jury trial in the United States District Court for the Northern District of Illinois. Richard Messino and Clement Messino were each sentenced to life imprisonment, while Paul Messino and Christopher Messino were each sentenced to 235 months' imprisonment. App., *infra*, 2a-3a. Respondents appealed their convictions, and the court of appeals reversed, holding that the district court had provided a misleading description of the jury-selection process, that respondents' right to exercise peremptory challenges had consequently been impaired, and that any impairment of a defendant's right to exercise peremptory challenges requires reversal "irrespective of prejudice." *Id.* at 4a-19a. The government's suggestion for rehearing en banc was denied over the dissent of Judge Easterbrook, joined by Chief Judge Posner and Judges Manion and Evans. *Id.* at 27a-41a.

1. From 1980 through 1991, respondents and others participated in a wide-ranging drug conspiracy, purchasing large quantities of cocaine in Florida, transporting the cocaine to Illinois, and reselling it in the Chicago area. Respondents Richard Messino and Clement Messino, brothers who had previously been officers of the Chicago Police Department, were the leaders of the conspiracy. Respondents Paul Messino and Christopher Messino, who are Richard's sons, were among those who transported cocaine from Florida to Illinois. During the course of the conspiracy, the conspirators acquired and resold

hundreds of kilograms of cocaine. App., *infra*, 2a-3a; Gov't C.A. Br. 71-73.

In 1989, one of the conspirators, Michael Conklin, was arrested and began to cooperate with the authorities. Paul and Christopher Messino subsequently made a series of cocaine sales to Conklin and to an undercover agent of the Drug Enforcement Administration. In addition, based on a tip from a confidential informant, Christopher Messino was arrested in Florida while in possession of three kilograms of cocaine. Finally, in a subsequent conversation that was tape-recorded, Richard Messino advised another conspirator, George Thorpe, that the government was looking for a "pigeon," and urged Thorpe not to "let everybody down" and to be "quiet." Gov't C.A. Br. 9-12.

2. On November 18, 1993, respondents and eight others were charged, in a thirteen-count superseding indictment, with conspiracy to distribute cocaine and to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. The indictment also charged Richard and Clement Messino with willfully filing false tax returns, in violation of 26 U.S.C. 7206(1); Paul and Christopher Messino with distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); Christopher Messino with possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); Clement Messino with money laundering, in violation of 18 U.S.C. 1956; and Richard Messino with obstruction of justice, in violation of 18 U.S.C. 1503. The indictment also contained numerous criminal forfeiture allegations relating to property of the conspirators. Four of the conspirators pleaded guilty, and charges against another were dismissed.

The remaining seven defendants, including all four respondents, proceeded to trial. App., *infra*, 2a-3a.

3. At the outset of the trial, the district judge explained his jury-selection procedures. 2/13 Tr. 10-13. He indicated that thirty-eight potential jurors would be seated in the first two rows of the jury box. *Id.* at 12.[1] After the potential jurors were questioned, the parties were to write down their peremptory challenges. *Id.* at 10. Potential jurors who were challenged would be excused, and the jury would consist of the first eighteen remaining jurors, "on the Clerk's list as she calls them. * * * The first twelve will be the jury, and the next 6 will be the alternates, in the manner in which they are called." *Id.* at 11.

Thirty-eight potential jurors were then placed in the first two rows of the jury box, and the potential jurors were individually questioned. The questioning began with the first potential juror on the courtroom clerk's list, who was seated in the first seat in the jury box. The questioning then proceeded to the second potential juror on the clerk's list. That potential juror was excused for cause. The clerk then called the thirty-ninth potential juror on the list to fill the vacancy in the second seat in the jury box. Questioning of the remaining potential jurors proceeded in the same fashion, and, when a potential

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[1] The district court chose that number to ensure that a jury of twelve regular jurors and six alternates would remain if the parties exercised all of their peremptory challenges. Pursuant to Rule 24(b) of the Federal Rules of Criminal Procedure, the government in this case was entitled to six peremptory challenges and defendants collectively were entitled to ten. The district court also provided each side with two peremptory challenges for use against potential alternates. 2/13 Tr. 11-12.

juror in a given seat was excused for cause, a new potential juror from further down the clerk's list was placed in that seat and questioned. 2/13 Tr. 24-32.

Eventually, that process yielded a group of thirty-eight potential jurors who had not been excused for cause. Counsel then prepared their lists of peremptory challenges and submitted them to the judge. After announcing the parties' challenges, the judge began to read the list of the twelve regular jurors. When the judge announced the ninth regular juror, counsel for one of the co-defendants interrupted, indicating that he had thought that that juror was going to be an alternate rather than a regular juror. It emerged that the defense attorneys had misunderstood the judge's explanation of his jury-selection procedures. They had understood that the potential jurors were ordered by the places in which they were seated, so that, for example, the juror who was thirty-ninth on the original list of jurors, but who replaced the juror who had been sitting in the second seat, would be second in line to be a regular juror. The judge had intended, however, and the prosecutor had understood, that the jurors would be ordered by their placement on the clerk's list, not by the seats in which they were placed during questioning. 2/13 Tr. 206-213.

Defense counsel explained that their misunderstanding had led them to exercise their peremptory challenges differently than they would have done if they had understood the judge's procedures. In support of that assertion, defense counsel referred to two specific jurors, Pamela Boucher and Mohammed Suleman, who one or more defense counsel claimed would have been challenged had counsel understood

that they would be regular jurors rather than alternates. 2/13 Tr. 209-210.[2]

Defense counsel did not, however, ask that the judge start the peremptory-challenge process over. Rather, their sole request (which was expressly made by some but not all defense counsel) was that the judge re- ler the jurors according to the order in which they were seated, thus designating as alternates those jurors who defense counsel had thought would be alternates. The government objected, and the district court declined to grant the request. 2/13 Tr. 209-213. During the course of the trial, one alternate and three regular jurors were excused. Trial Tr. 46, 193, 212, 7640. The remaining two alternates were excused when the jury began its deliberations. *Id.* at 7821.

4. Respondents were found guilty of all of the charges against them, while the remaining four

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[2] Counsel for Christopher Messino said that juror Boucher was "our biggest complaint * * *. We had reserved her for a challenge, should she had [*sic*] been in the position that she would ordinarily have taken. Now, your Honor, because she was effectively moved up in the list, then we wouldn't mind her being a member of the alternates." 2/13 Tr. 209.

The sole attorneys to mention juror Suleman represented defendants who were acquitted at trial:

> MS. EPSTEIN [counsel for Gray Chrystall]: It is the very last one. I wanted to strike him and exercise the preemptory [*sic*], and he said he is going to be the very, very last alternate, no matter what.
>
> MR. GEVIRTZ [counsel for Blaise Messino]: Because he was the last one questioned.
>
> MR. LOEB [counsel for Donald Southern]: Right.

2/13 Tr. 209.

defendants who went to trial were acquitted. Respondents Richard Messino and Clement Messino were each sentenced to life imprisonment, and respondents Paul Messino and Christopher Messino were each sentenced to 235 months' imprisonment. Respondents appealed, and their appeal was consolidated with the appeal of William Underwood, one of the defendants who had pleaded guilty. App., *infra*, 3a.

The court of appeals reversed respondents' convictions.[3] App., *infra*, 1a-2a. It held that the jury-selection process "violated [respondents'] Fifth Amendment due process rights by impairing the intelligent exercise of the peremptory challenges to which [respondents] were entitled under Rule 24" of the Federal Rules of Criminal Procedure. *Id.* at 6a. It further held that such violations require reversal "irrespective of prejudice." *Ibid.*

The court of appeals based its finding of a due process violation on its conclusion that the district court had given a "misleading" explanation of the jury-selection process. App., *infra*, 15a. The court further concluded that respondents' intelligent exercise of their peremptory challenges was impaired, because, "relying on their erroneous belief about the judge's list, defense counsel opted not to challenge two particular potential jurors on the belief that they were too far down the list to make it onto the petit jury and if anything, would be mere alternates. These two jurors, however, were among the first twelve on the judge's list, and sat as jurors at trial." *Id.* at 14a.

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[3] Because the court of appeals affirmed Underwood's conviction and sentence (App., *infra*, 2a), we have not named him as a respondent in this petition.

In holding that the jury-selection error required per se reversal, without a showing of prejudice, the court relied on language in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). App., *infra*, 6a. While the court acknowledged that "not all restrictions on the right to peremptory challenge constitute the denial or impairment of the right," *id.* at 6a-7a & n.3, it stated that "harmless error analysis is inappropriate where a defendant's statutory right to peremptory challenges has been denied or impaired," *id.* at 7a.

Judge Flaum concurred in the judgment. He expressed concern about the breadth of the majority's statements that interferences with the right to exercise peremptory challenges invariably require reversal without regard to prejudice. App., *infra*, 23a. Judge Flaum agreed with the majority, however, that the judge's explanation of the jury-selection process "materially misled" defense counsel, and that reversal was appropriate in such circumstances. *Id.* at 23a-26a.

5. Judge Easterbrook dissented from the denial of the government's request for rehearing en banc, joined by Chief Judge Posner and Judges Manion and Evans. App., *infra.*, at 28a-41a.

Judge Easterbrook pointed out that there is a conflict among the courts of appeals on the question whether errors impairing a defendant's exercise of peremptory challenges can be harmless. App., *infra*, 28a-29a. He also emphasized the importance and recurring nature of that question. *Id.* at 29a, 41a. On the merits, Judge Easterbrook reasoned that a rule of per se reversal cannot be reconciled with 28 U.S.C. 2111 (court shall give judgment "without regard to errors which do not affect the substantial rights of the parties"), Rule 52(a) of the Federal Rules of

Criminal Procedure (errors that do not "affect substantial rights shall be disregarded"), and the decisions of this Court in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988), *United States* v. *Lane*, 474 U.S. 438 (1986), and *United States* v. *Hasting*, 461 U.S. 499 (1983). App., *infra*, 30a-38a. Finally, Judge Easterbrook expressed the view that, so long as the jury actually seated is impartial, errors affecting the exercise of peremptory challenges would rarely if ever rise to the level of a denial of a substantial right. *Id.* at 38a-41a.

REASONS FOR GRANTING THE PETITION

The court of appeals held in this case that "harmless error analysis is inappropriate where a defendant's statutory right to peremptory challenge has been denied or impaired." App., *infra*, 7a. That holding deepens a conflict in the courts of appeals on the issue whether harmless-error analysis applies to errors impairing the exercise of a defendant's peremptory challenges. The court of appeals' holding is also incorrect. This Court's harmless-error cases, a federal statute, 28 U.S.C. 2111, and Federal Rule of Criminal Procedure 52(a) all make clear that errors in federal criminal trials do not warrant reversal absent an effect on a defendant's substantial rights. And under a proper application of harmless-error doctrine, any error in this case did not affect respondents' "substantial rights," Fed. R. Crim. P. 52(a), and did not warrant reversal. Because peremptory challenges are exercised in every jury trial, and because the question whether errors that impair their exercise justify reversal in every case without any inquiry into prejudice is a recurring and

important one, this Court's resolution of the conflict in the circuits is warranted.

1. The courts of appeals have reached conflicting conclusions on whether errors impairing the exercise of a defendant's peremptory challenges are subject to harmless-error analysis. Like the Seventh Circuit in the present case,[4] the Third Circuit and the Ninth Circuit have held that errors impairing the exercise of a criminal defendant's peremptory challenges are not subject to harmless-error analysis and therefore require reversal per se. See, *e.g.*, *United States* v. *Ruuska*, 883 F.2d 262, 267-268 (3d Cir. 1989); *United States* v. *Annigoni*, 96 F.3d 1132, 1134 (9th Cir. 1996) (en banc); cf. *Kirk* v. *Raymark Indus.*, 61 F.3d 147, 158-162 (3d Cir. 1995) (civil case), cert. denied, 516 U.S. 1145 (1996). The Eighth, Tenth, and Eleventh Circuits, however, apply harmless-error analysis to errors impairing a criminal defendant's exercise of peremptory challenges, and have found such errors harmless. See, *e.g.*, *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997), cert. denied, 118 S. Ct. 702 (1998); *United States* v. *McIntyre*, 997 F.2d 687, 698 n.7 (10th Cir. 1993), cert. denied, 510 U.S. 1063 (1994); *United States* v. *Farmer*, 923 F.2d 1557, 1566 & n.20 (11th Cir. 1991); cf. *Getter* v. *Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995) (civil case), cert.

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[4] In two earlier cases, the Seventh Circuit had applied harmless-error analysis to errors impairing a defendant's exercise of peremptory challenges, and had found such errors harmless. See *United States* v. *Nururdin*, 8 F.3d 1187, 1191 (1993), cert. denied, 510 U.S. 1206 (1994); *United States* v. *Dennis*, 737 F.2d 617, 619, cert. denied, 469 U.S. 868 (1984).

denied, 516 U.S. 1146 (1996). The law in several other circuits is internally inconsistent or unclear.[5]

That well-developed circuit split involves an important and recurring question of federal law. Peremptory challenges are exercised in every jury trial. The risk that a district court might commit error affecting the exercise of peremptory challenges exists in all cases, because the ground rules for exercising challenges may be unclear, mistakes may be made in allocating strikes, or defendants may claim that the erroneous denial of a challenge for cause improperly forced the "waste" of a peremptory challenge. In addition, courts may err in the application of constitutional principles prohibiting the parties from exercising challenges based on the race or gender of the excluded juror. See *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Batson* v. *Kentucky*, 476 U.S. 79 (1986). As Judge Easterbrook explained (App., *infra*, 29a),

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[5] Compare *United States* v. *Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996) (errors impairing defendant's exercise of peremptory challenges require per se reversal) (dicta; citing *Carr* v. *Watts*, 597 F.2d 830, 833 (2d Cir. 1979)), cert. denied, 117 S. Ct. 771 (1997), with *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994) (finding error impairing defendant's exercise of peremptory challenges to be harmless). Compare also *United States* v. *Love*, 134 F.3d 595, 600-603 (4th Cir. 1998) (error impairing exercise of peremptory challenges requires reversal only if prejudice is shown), with *United States* v. *Ricks*, 802 F.2d 731, 734 (4th Cir.) (en banc) (errors impairing exercise of peremptory challenges require per se reversal), cert. denied, 479 U.S. 1009 (1986). See also *United States* v. *Bryant*, 991 F.2d 171, 174 n.3 (5th Cir. 1993) (noting intra-circuit conflict on question whether errors affecting defendant's exercise of peremptory challenges require per se reversal).

> Assessing challenges on the fly yields many claims of error, and other things too can go awry, as they did in the jury selection preceding [respondents'] trial. Today's case starkly presents the question whether harmless-error analysis is necessary; no factual complications or extraneous legal questions impede decision. Our panel recognized that the subject is important, one judge wrote separately to express doubts about the doctrine of automatic reversal, and the conflict among the circuits demonstrates that the problem is common elsewhere.

2. a. The decision of the court of appeals is incorrect. Decisions of this Court, and a controlling federal statute and rule, establish that errors impairing the exercise of peremptory challenges are subject to harmless-error analysis.[6]

Like many of the decisions that apply a rule of per se reversal to errors impairing the exercise of peremptory challenges, the decision of the court of appeals in this case relied heavily on this Court's dictum in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). App., *infra*, 6a ("The denial or impairment of the right [to peremptory challenge] is reversible error without a showing of prejudice.") (quoting *Swain*, 380 U.S.

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[6] The government contended in the court of appeals that the district court's explanation of the manner of jury selection was not misleading, and that the district court's refusal to redesignate the jurors was therefore not error. See, *e.g.*, Gov't Pet. for Reh'g 11-14. Because the contrary conclusion of the court of appeals does not present a legal question of general importance, the government does not seek review of that conclusion in this Court. Cf. *United States* v. *Lane*, 474 U.S. 438, 444 n.5 (1986); *United States* v. *Hasting*, 461 U.S. 499, 506 n.4 (1983).

at 219). *Swain* in turn relied upon a series of early decisions from this Court reversing criminal convictions on the basis of errors impairing defendants' exercise of their peremptory challenges. 380 U.S. at 219 (citing *Harrison* v. *United States*, 163 U.S. 140, 142 (1896); *Gulf, Colorado & Santa Fe Ry.* v. *Shane*, 157 U.S. 348, 351 (1895); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892)). As Judge Easterbrook noted, however, the cases cited in *Swain* do not accurately reflect present law: "These cases have one essential feature in common: they were decided more than a century ago, during the Bad Old Days when appellate courts reversed for any error. It is exactly this inflexibility that [28 U.S.C. 2111] and [Federal Rule of Criminal Procedure 52(a)] jettison." App., *infra*, 35a.

Section 2111 of Title 28 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors which do not affect the substantial rights of the parties." Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This Court has repeatedly held that *all* errors in federal criminal proceedings are subject to the inquiry into the effect on substantial rights mandated by 28 U.S.C. 2111 and Rule 52(a).[7] See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal

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[7] If no proper objection is made in the district court, however, errors in criminal cases are reviewed under the plain-error standard of Rule 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993).

Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."); *United States* v. *Lane*, 474 U.S. 438, 444-449 & n.11 (1986) (relying on Rule 52(a) and 28 U.S.C. 2111, Court overrules earlier decision applying rule of per se reversal to violations of Federal Rule of Criminal Procedure 8 (governing joinder of charges); "on its face, Rule 52(a) admits of no broad exceptions to its applicability"); cf. *Johnson* v. *United States*, 117 S. Ct. 1544, 1548 (1997) (rejecting claim that Court should carve out exception from Rule 52 for "structural errors"; Rule 52 "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. * * * Even less appropriate than an unwarranted expansion of the Rule would be the creation out of wholecloth of an exception to it, an exception which we have no authority to make.").

More specifically, this Court has relied upon Section 2111 and Federal Rule of Civil Procedure 61—a civil analogue to Rule 52(a)—in determining whether an impairment of the exercise of peremptory challenges justified granting a new trial in a civil case. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984) ("We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered citadels of technicality. The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the es-

sential fairness of the trial.") (internal quotation marks and citation omitted). Those authorities establish that the court of appeals erred by applying a rule of per se reversal to errors impairing the exercise of peremptory challenges, rather than conducting the inquiry, required by this Court's cases, by 28 U.S.C. 2111, and by Rule 52(a), into whether any error affected respondents' substantial rights.

b. The error in the present case did not affect respondents' substantial rights. In general, in order to affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings."[8] *United States* v. *Olano*, 507 U.S. 725, 734 (1993); see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). The error

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[8] When the error in question is of constitutional dimension, the government bears the burden of showing beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967); *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983). When the error is not of constitutional dimension, the government bears the burden of demonstrating that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). Although the court of appeals held in the present case that the error at issue rose to the level of a violation of the Due Process Clause (App., *infra*, 6a), that holding was incorrect. See, *e.g.*, *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) (the right to exercise peremptory challenges is "not of constitutional dimension"); cf., *e.g.*, *Lane*, 474 U.S. at 446 n.8 (A violation of Rule 8 of the Federal Rules of Criminal Procedure, governing joinder of charges, would "not, in itself, violate the Constitution. Rather, [such a violation] would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.").

in the present case cannot reasonably be supposed to have had any such effect:

> In a trial like this, the possibility that lawyers' confusion in the exercise of peremptory challenges altered the outcome is too remote to be worth investigating. The confusion affected only two members of the venire—one of whom was objectionable to just one attorney (whose client[] [was] acquitted), and the other of whom the defense deemed an acceptable alternate juror. Perhaps it is impossible to show that the loss or disallowance of a peremptory challenge affected the outcome of a trial—but inability to trace adverse effects to a mistake does not justify reversing a conviction; it shows instead that there is no warrant for disturbing the judgment.

App., *infra*, 40a-41a (Easterbrook, J., dissenting from denial of rehearing en banc).

Nor does the error in the present case fall within the narrow category of fundamental constitutional errors that require reversal under the harmless-error test even though they cannot be shown to have affected the outcome of trial proceedings. See, *e.g.*, *Olano*, 507 U.S. at 735 (referring to errors that deprive defendants of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). One example of such an error is the seating, over the defendant's objection, of an actually biased juror. See, *e.g.*, *Rose*, 478 U.S. at 578; *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966). But where no actually biased juror is seated,

errors affecting the exercise of peremptory challenges will rarely, if ever, affect a substantial right of a defendant. As Judge Easterbrook explained (App., *infra*, 39a):

> If the jury that actually sits is impartial, the defendant has enjoyed the *substantial* right. * * * Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries.

Cf. *McDonough*, 464 U.S. at 553-556 (unless the juror is actually biased, the failure of a juror in a civil case to reveal information that would have led a party to exercise a peremptory challenge to remove the juror is not a ground for granting a new trial).

It is undisputed in the present case that all of the seated jurors were impartial. At most, the error in the present case caused two potential jurors who otherwise would have been excused to participate as regular jurors. Respondents were willing to accept all of the jurors who deliberated, at least as alternates. Under the circumstances, any error did not "affect [respondents'] substantial rights," 28 U.S.C. 2111, and did not justify reversal of respondents' convictions. The court of appeals' contrary judgment, and the rule of law it invokes, warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-2155, 95-2925, 95-2926, 95-3052 and 95-3124

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIAM UNDERWOOD, PAUL MESSINO,
CHRISTOPHER B. MESSINO, CHRISTOPHER RICHARD
MESSINO, AND CLEMENT MESSINO,
DEFENDANTS-APPELLANTS

[Argued May 28, 1997
Decided Aug. 7, 1997]

Before: CUDAHY, ESCHBACH, and FLAUM, Circuit Judges.

ESCHBACH, Circuit Judge.

Because the process of empaneling a jury is largely ungoverned by uniform procedural rules, yet fraught with opportunity for constitutional violation, the trial court is well-advised to exercise particular caution during the process. In this case, an unintentionally misleading description of the court's method of jury selection, which the court chose not to remedy after the confusion surfaced, compels us to reverse the convictions of four of the five appellants. The fifth

appellant, William Underwood, pled guilty and thus only challenges his sentence, which we affirm.

I. Background

On November 18, 1993, a grand jury returned a thirteen-count superseding indictment against twelve defendants, including the five appellants who now bring this appeal: William Underwood, Paul Messino ("Paul"), Christopher B. Messino ("Chris"), Christopher Richard Messino ("Dick"), and Clement Messino ("Clement"). The core allegation in the indictment charged all twelve defendants with conspiracy to distribute and possess with intent to distribute multi-kilogram quantities of cocaine. *See* 21 U.S.C. §§ 841(a)(1) & 846. The object of the conspiracy, which allegedly spanned the eleven-year period from 1980-1991, was to purchase cocaine in Florida, and transport it to Illinois for distribution in the Chicago area. Dick and Clement, brothers and former officers of the Chicago Police Department, were the alleged leaders of the conspiracy, and were assisted by Dick's sons Chris and Paul, among others. In addition to the shared conspiracy charge, the appellants here were also separately indicted for the following: Chris and Paul for distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1); Clement and Dick for willfully making false declarations about income to the Internal Revenue Service, in violation of 26 U.S.C. § 7206(1); Clement for money laundering in connection with his June 1991 purchase of property in Monee, Illinois, in violation of 18 U.S.C. § 1956; and Dick for obstruction of justice for attempting to influence a witness's grand jury testimony, in violation of 18 U.S.C. § 1503. The indictment also contained numerous criminal forfeiture allegations relating

to real and personal property of appellants, on the grounds that these properties were used in the commission of crime, were proceeds of crime, or were derived from proceeds of crime.[1]

After ruling on an exhausting thirteen-month round of pretrial motions, the district court proceeded with jury selection (an issue to which we will shortly return), and began trial on February 13, 1995. At the trial's end on April 27, 1995, Chris, Clement, Dick, and Paul (collectively "the Messinos") were convicted on all counts and received sentences ranging from 235 months to life imprisonment.[2] On appeal, the Messinos bring a legion of claims challenging both their jury convictions and sentences. Underwood, who did not participate in the jury trial because he chose to plead guilty, received a 121-month term of imprisonment, which he now appeals.

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[1] The allegedly forfeitable properties included seven residential and business properties in Illinois and Florida, fifteen automobiles (including passenger cars, collectible cars, and race cars), three Harley Davidson motorcycles, two speed boats, and over $4,000,000 in cash.

[2] The charges against the non-appellant defendants, recited in *United States v. Messino*, 852 F. Supp. 652 (N.D. Ill. 1994), were disposed of as follows: the charges against Lawrence Thomas were dismissed; Michael Homerding, Thomas Hauck, and Daniel C. Shoemaker pled guilty and were sentenced; and Blaise Messino, Donald Southern, and Gray Chrystall were acquitted at trial.

II. Discussion

A. The Messinos

The issues brought before us on appeal chronicle the difficult decisions that the district court faced at trial. For example, the evidence we reviewed revealed close questions on whether the government met its burden to prove a single conspiracy instead of multiple conspiracies and on the appropriate statute of limitations to apply to criminal forfeiture actions. In addition, we note that *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), a case decided after the Messino trial, casts doubt on the district court's decision to decide the "materiality" of a false statement made on Dick's tax return as a matter of law, instead of submitting it to the jury. *See United States v. DiDomenico*, 78 F.3d 294, 302-303 (7th Cir. 1996); *United States v. Uchimura*, 107 F.3d 1321 (9th Cir. 1997); *United States v. DiRico*, 78 F.3d 732 (1st Cir. 1996). *But see United States v. Klausner*, 80 F.3d 55 (2d Cir. 1996). We need not further discuss these interesting issues, however, in light of our decision to reverse all convictions stemming from the jury trial due to an impairment of the defendants' rights to peremptory challenges during the jury selection process. We therefore limit our discussion to the facts and legal analysis necessary to our decision on the jury selection issue.

The Messinos argue that they were unable to intelligently exercise their peremptory challenges because they were operating under a reasonable misapprehension about the judge's jury selection procedure. In his prefatory description of the process, the judge told counsel that of the potential jurors who

survived for-cause and peremptory challenges, the "first twelve" left would constitute the petit jury and the next six would be the alternates. Based on the language used by the judge in his description, and on the visual impact of the selection process itself, defendants thought that the "first twelve" meant the first twelve jurors as they were seated in the jury box. In fact, the judge meant the first twelve names as they appeared on a jury list that only he and his clerk possessed, which did not correspond to the order of seating in the jury box. Defendants maintain that the effect of this misunderstanding, which the judge easily could have remedied after it was brought to his attention, was to impair the intelligent exercise of their peremptory challenges.

The Federal Rules of Criminal Procedure give no guidance as to the manner in which peremptory challenges should be exercised in a criminal trial, leaving this and most other jury selection procedures to the discretion of the trial judge. *See United States v. Harris*, 542 F.2d 1283, 1295 (7th Cir. 1976). That discretion, however, is not without limits. Abuse of discretion could result, for example, from the "violation of settled principles of criminal law, federal statutes, or constitutional rights of [a] defendant." *United States v. Mackey*, 345 F.2d 499, 502 (7th Cir. 1965). The right to exercise peremptory challenges is "'one of the most important of the rights secured to the accused.'" *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759 (1965) (quoting *Pointer v. United States*, 151 U.S. 396, 408, 14 S. Ct. 410, 414, 38 L. Ed. 208 (1894)). When the jury selection method used by the court arbitrarily denies or impairs the use of that right, resulting in a due

process violation, abuse of discretion is clear. Because peremptory challenges are statutorily granted, not constitutionally guaranteed, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which [statutory] law provides." *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273, 2279, 101 L. Ed. 2d 80 (1988). Our inquiry today, therefore, is whether the defendants were able to intelligently exercise the peremptory challenges to which they were entitled under Federal Rule of Criminal Procedure 24, the statute that authorizes the use of peremptories in a federal criminal trial.

After a careful review of the record, we are convinced that the jury selection process here violated the defendants' Fifth Amendment due process rights by impairing the intelligent exercise of the peremptory challenges to which they were entitled under Rule 24. Accordingly, we must reverse the Messinos' convictions irrespective of prejudice. *Swain*, 380 U.S. at 219, 85 S. Ct. at 835 ("The denial or impairment of the right [to peremptory challenge] is reversible error without a showing of prejudice."); *see also Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990) ("[I]ssues of entitlement to a particular kind of tribunal are in general not subject to the harmless error rule. . . . It is reversible error to deny a party to a jury trial the peremptory challenges to which the rules of procedure entitle him."). The government argues that automatic reversal is unnecessary because the Supreme Court's decision in *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), authorizes the use of harmless error analysis in this circumstance. We disagree. Although not all restric-

tions on the right to peremptory challenge constitute the denial or impairment of the right, *see, e.g., Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), *Ross* does not authorize us to abandon the automatic reversal rule that the Supreme Court announced in *Swain* where, as here, a denial or impairment of a defendant's statutory right to the intelligent exercise of peremptory challenges is found. We therefore join our sister circuits that have held, post-*Ross*, that harmless error analysis is inappropriate where a defendant's statutory right to peremptory challenge has been denied or impaired.[3] *See United States v. Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 771, 136 L. Ed. 2d 717 (1997), and *cert. denied sub nom. Richards v. United States*, — U.S. —, 117 S. Ct. 771, 136 L. Ed. 2d 717 (1997), and *cert. denied sub nom. Nelson v. United States*, — U.S. —, 117 S. Ct. 772, 136 L. Ed. 2d 717 (1997); *United States v. Annigoni*, 96 F.3d 1132, 1147 (9th Cir. 1996) (*en banc*); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 162 (3d Cir. 1995), *cert. denied*, — U.S. —, 116 S. Ct. 1015, 134 L. Ed. 2d 95 (1996); *Knox v. Collins*, 928 F.2d 657, 661 (5th Cir. 1991).

On the day of jury selection in the Messino trial, the district judge met with counsel in chambers to discuss the method of jury empaneling. Using a

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[3] We share Judge Flaum's concern (as expressed in his concurrence) about "a broad rule of automatic reversal, applicable whenever a defendant has suffered an infringement of his right to exercise peremptory challenges." Since the cases refer to the "denial or impairment" of such a right, we believe the answer to this perplexing question may be found, at least in part, in narrowly defining "denial or impairment."

version of the "struck jury" system,[4] the judge would call a panel of 38 jurors who would be examined and challenged for cause by both sides. Excused jurors would be replaced on the panel, and examination and for-cause challenging of the replacements would continue until the entire panel of 38 was qualified. Counsel for the government and defendants would then separately submit their lists of peremptory challenges to the judge in chambers.[5] From the remain-

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[4] Although the lack of uniform rules leads to local variation, courts typically use one of two basic methods to accommodate the use of peremptory challenges: the "struck jury" system or the "jury box" system. Under the struck jury system, for-cause challenges are made first, until a sufficiently large panel of qualified jurors remains to fill the juror and alternate juror positions should all peremptory challenges be exercised against different jurors. This method allows counsel to see everyone who could potentially be on the jury and select the comparatively most objectionable ones to strike. Under the "jury box" method, however, the parties exercise both their for-cause and peremptory challenges one juror at a time during voir dire questioning, without the benefit of knowing who the replacement juror will be. For a fuller discussion and comparison of these two methods, see *United States v. Blouin*, 666 F.2d 796 (2d Cir. 1981); 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3 at 735 (1984).

[5] In a non-capital felony trial, the Federal Rules of Criminal Procedure entitle the defendant (or defendants jointly) to exercise ten peremptory challenges and the government to exercise six. Fed. R. Crim. P. 24(b). Where, as here, the court calls for six jurors to sit as alternate jurors, each side is entitled to an additional three peremptory challenges. Fed. R. Crim. P. 24(c). Although the Rules thus entitled defendants to thirteen challenges and the government to nine, they received twelve and eight respectively. Defendants do not appeal the number of peremptory challenges they were allowed.

ing names, the judge would determine who would be a juror and who would be an alternate. In response to a question by defense counsel, the judge explained how he would make that determination:

> THE COURT: We will put [38 jurors] in the box in the first two rows. Then the first 18 that are left [after for-cause and peremptory challenges] will be the jury, the fist [sic] 12 being the jury, of course, and the next 6 being the alternates.[6]

Trial Tr. Vol. 1A, at 10-11 (Feb. 13, 1995). Because the government and defense might not exercise all of their peremptory challenges, the court explained that some of the 38 potential jurors on the panel might be "left over"—*i.e.*, neither jurors nor alternates. In that case, he explained, "So [the jury] will be on my Clerk's list as she calls them. It will be the first 18. The first 12 will be the jury, and the next 6 will be the alternates, in the manner in which they are called." *Id.* After this discussion in chambers, everyone returned to the courtroom to begin jury selection.

From the venire, the judge's clerk called out the names of 38 potential jurors. The judge instructed them to fill the jury box and the first two pews next to the jury box in the order in which they were called. Thus, the first juror called sat in the first seat in the first row of the jury box, the second juror called sat in the second seat in the first row of the jury box, and so

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[6] Initially the judge called for a pool of 34 jurors, but increased the number to 38 following his decision to empanel 6 alternate jurors. The increase was necessary to ensure that enough potential jurors would remain to fill the 18 juror and alternate juror positions should all 20 peremptory strikes be exercised against different potential jurors.

on, until the jury box and the first two courtroom pews were filled. Members of the venire whose names were not initially called were seated separately in the courtroom, in no particular order, to create a reserve from which new jurors could be drawn to replace jurors excused for cause during voir dire.

The court then began voir dire. Upon excusing a juror for cause, the judge called the name of a reserve venireperson to replace the excused juror, and instructed the replacement to take the excused juror's vacated seat. For example, when the juror in the second seat in the jury box was excused for cause, the replacement juror took the second seat, as opposed to sitting at the end of the first 38 seated jurors. Once the replacement juror was seated, the judge would resume his questioning with that juror. Questioning and replacement continued down the rows in this fashion until all 38 seats were filled with potential jurors that the court found acceptable. At the end of voir dire, prosecution and defense counsel met in the judge's chambers to exercise their peremptory challenges against the 38 qualified jurors. After reciting and striking the names of the potential jurors challenged by each side, the judge began reading the names of the petit jury members. When the court named Pamela Boucher as juror nine, defense counsel erupted with comments indicating their confusion about the judge's method of ordering jurors and alternates:

> MR. LOEB (Donald Southern's counsel): We have got her [Boucher] as an alternate according to the way they are sitting now.
>
> THE COURT: No, it is according to this list.

* * * * * *

> MR. ROLLER (Clement's counsel): Judge, defense counsel operated under an erroneous assumption as to the manner or the order in which the prospective jurors would be impaneled on the jury. It was our impression that they would be impaneled on the jury by the way that they were called, even as substituted. In other words, the way they were sitting, beginning and going back to the second row [of the jury box] and then into the gallery. That is the basis upon which we made our strikes, Judge.[7]

Trial Tr. Vol 1A, at 207-08 (Feb. 13, 1995). It was at this point that defense counsel became aware that the judge was ordering the potential jurors according to a list they did not possess, instead of in the order in which they were seated.[8] The judge's list began with

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[7] In a multi-defendant trial, Federal Rule of Criminal Procedure 24 allows the defendants to either divide the total number of allowed strikes evenly among defendants or exercise the strikes jointly. The record reflects that defense counsel jointly exercised their twelve peremptory strikes.

[8] Other defense counsel immediately joined in to express their surprise and dismay that the judge ordered the members of the jury and alternates according to the judge's list, instead of according to the order in which they were seated and questioned:

> MS. EPSTEIN (Gray Chrystall's counsel): Now there are people at the very, very end that we were reserving strike, on the jury, where we were making the assumption that they would be the last alternate.
>
> * * * * * *

MR. LOEB (Donald Southern's counsel): Just a minute, our quibble now is not just which individuals remain among the 18, but it is who are the 12 that are sitting before the alternates. The significance to us, and we didn't even discuss it, we all presumed it independently.

MR. GEVIRTZ (Blaise Messino's counsel): We assumed that when somebody went into that chair, No. 2, he became No. 2.

* * * * * *

MR. MARTIN (Dick's counsel): We would have exercised our challenges differently Judge.

THE COURT: I told you, this is the list, that it was going to be, the first 12 were going to the jury that was left on this list. These six were going to the alternates.

MR. LOEB: We interpreted that as the first 12 as they sat in the jury box.

MR. GEVIRTZ: When you didn't move them up and fill in as they were coming in, I assumed when they sat and filled in, they became that number in that spot.

* * * * * *

THE COURT: I thought I told you, that it was going to be done according to the list, eliminating all of the strikes, as they would appear on the jury sheet.

MS. EPSTEIN: We didn't have [the jury sheet]. All we had was the way they were sitting. We were not given the jury sheet. All we had was, we could see where they were sitting and in what order they were being questioned. Therefore, we assumed—for instance, somebody like Suleman was questioned the very last, would be the last alternate, if he didn't [receive a peremptory challenge].

MR. GUTIERREZ (Chris's counsel): Judge, our biggest complaint is that particularly Pamela Boucher. We had reserved her for a challenge, should she had been in the position that she would have ordinarily taken. Now, your

the names of the 38 potential jurors originally called and seated. When the judge excused one of the 38 for cause, the judge's clerk would call the name of a reserve juror as a replacement. Instead of crossing out the name of the excused juror and filling in the replacement juror's name on his list, the judge put the replacement juror's name at the end of his jury list. For example, when the judge excused the second juror called, the first of the 38 jurors he excused, the judge called the name of a replacement juror and asked the replacement to take the vacated seat (the second seat in the jury box). However, instead of putting the replacement juror's name second on his list, which would have been consistent with where he seated the replacement juror, he put the name 39th on his list, after the names of the first 38 jurors called. According to the defendant's (mis)understanding of the judge's method, this replacement juror would have been number 2 on the judge's list. Because so many potential jurors were excused for cause, there was a large discrepancy between the first twelve names on the judge's list, and the first twelve names defense

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> Honor, because she effectively moved up in the list, then we wouldn't mind her being a member of the alternates. But certainly if we had known that she was moving up, as a musical chair instead of a replacement chair.
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> MR. MARTIN: Judge, ever[y] single defense lawyer here, we discussed that, and that is each one of our impression, and we discussed that. We would have exercised the challenges differently, if anybody had known. We don't have that list, your Honor has. We were going by the way you were replacing them.

Trial Tr. Vol. 1A, at 208-211 (Feb. 13, 1995).

counsel *thought* would be on that list. Relying on their erroneous belief about the judge's list, defense counsel opted not to challenge two particular potential jurors on the belief that they were too far down the list to make it onto the petit jury and if anything, would be mere alternates. These two jurors, however, were among the first twelve on the judge's list, and sat as jurors at trial.

Upon becoming aware of the confusion, the judge would have been wise to exercise an ounce of prevention to avoid what has turned out to be a troubling pound of cure. Instead, the judge responded to the numerous and vehement objections by apologizing for the confusion, but refusing to "do it over." Defense counsel suggested that the court need not reselect the entire jury, but could instead call the jurors in the order in which they were seated in the box and were questioned. We see another alternative: the judge could have distributed his list to both parties and repeated only the peremptory challenge phase, a process which would have put the prosecution and defense on equal footing with a relatively minor affront to judicial efficiency. Nevertheless, the court refused to remedy the problem.

Based on this turn of events, we believe that the defendants' rights to the intelligent use of their peremptory strikes were impaired. The judge's prefatory description of his method of jury ordering did not comport with the method he actually used. The specific language the judge used, that he would "put 34 in the box . . . the [first] 12 being the jury," was reasonably interpreted by defense counsel to mean that the judge would order the potential jurors according to the manner in which they were seated:

the jurors in the first twelve occupied seats in the jury box after challenges would be the petit jury, the next six would be the alternates, and any remaining potential jurors would be excused. The reasonableness of this interpretation was bolstered by the visual impact of the order in which the jurors were seated and questioned during voir dire.[9] In order to be consistent with his actual method of ordering the jury, the judge could have seated replacement jurors at the end of the original 38 jurors called, instead of placing them in the excused jurors' vacated seats. The misleading description by the court, on which the defendants relied, failed to provide the adequate notice necessary for the defendants to intelligently exercise their peremptory challenges. That the court did not intend to mislead the parties is of no import. Regardless of the intention, impairment was the result.

Although the government claims to have understood the judge's ordering method, it does not claim that the court's prefatory remarks were clear, or that the defendants' interpretation of those remarks was unreasonable. Instead, the government contends that reversal is improper because any defense counsel misunderstanding was not the result of any error by the court, and that in any event, the defendants' rights were not "denied or impaired" because they in fact exercised the full number of challenges which they were allowed. These arguments do not persuade.

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[9] During voir dire, the court did not call replacement jurors by number, or otherwise refer to the potential jurors in a way which might have alerted defense counsel to the discrepancy. Thus, we find unreasonable neither defense counsel's certainty in its interpretation of the court's method nor its attendant failure to ask for clarification.

Our decision today does not turn on a belief that the judge's method of jury selection was itself improper. In fact, either method—the one described by the court or the one actually used by the court—would be a proper method of ordering the jurors, as long as all parties were given objectively adequate notice that this method would be used. *United States v. Turner*, 558 F.2d 535, 537-38 (9th Cir. 1977) (finding impairment of right to peremptory challenge, necessitating reversal, where "misunderstandings between the court and counsel about the district court's own ground rules" denied defendant adequate notice of the jury selection method used by the court). Without this notice, even if a defendant exercises the full quantity of peremptory challenges to which he is statutorily entitled, his ability to exercise them intelligently may be significantly impaired. In *United States v. Ricks*, 776 F.2d 455 (4th Cir. 1985), *amended on rehearing en banc*, 802 F.2d 731 (4th Cir. 1986), an attorney at trial asked the district judge about the order in which he would pick jurors from the list. The court responded that although it couldn't tell at that early stage, it "ordinarily . . . start[ed] . . . counting from the top" and that it would be reasonably fair for counsel to assume the same procedure. *Id.* at 459. Defendants exercised all of their peremptory strikes against jurors toward the top of the list. The court, however, started counting from the middle of the list. On appeal, the Fourth Circuit reversed, finding that "[t]he practical effect of defendants' counsels' not unreasonable belief that the jury would be chosen largely or substantially from the top of the list was to

frustrate the exercise of their peremptory strikes." *Id.* at 460-61.[10]

We face a parallel problem here—the defendants held an incorrect, yet reasonable belief about the judge's method of ordering the jurors based on misleading information from the court, which prevented the intelligent exercise of the peremptory challenges to which they were entitled. Where, as here, a defendant is faced with more objectionable jurors than he has peremptory strikes, he must make intelligent use of those strikes by considering strategic factors such as the strength of his objection to a potential juror and the likelihood that she will serve on the petit jury instead of as a mere alternate (or not at all). Although the court's chosen method of jury selection need not provide complete information on each factor, *see, e.g., United States v. Blouin*, 666 F.2d 796 (2d Cir. 1981) (holding "jury box" method used by court did not unduly restrict exercise of peremptories, even though it did not allow counsel to compare all jurors before exercising its strikes), any information it *does* provide should be correct information. The court's misleading description here caused defendants' incorrect predictions of the likelihood that each potential juror would be in the "first twelve" and thus sit on the petit jury. Because defendants had inadequate notice of the judge's actual method of ordering potential jurors, their strategic decisions based on a juror's likelihood of sitting on the petit jury were completely subverted. When strategy

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[10] On rehearing, the Fourth Circuit affirmed the majority panel's holding on these grounds and also found reversible error on an additional ground. *United States v. Ricks*, 802 F.2d 731 (4th Cir. 1986).

takes a back seat to chance in this manner, the result can hardly be considered the *intelligent* exercise of peremptory challenges to which a defendant is entitled.

The government also asserts that the way in which defense counsel exercised their strikes suggests that they in fact were aware of the judge's jury selection method, despite the misleading description. Our review of the record revealed no reason to question defense counsel's veracity. In fact we find this argument bordering on meretricious in light of the immediate, numerous, and vehement objections of defense counsel during the judge's recitation of the jury list. *See supra* n. 8. In addition, we reject any implication that because the government asserts an understanding of the method actually used by the judge, the method should also have been clear to defense counsel. The government's knowledge of Judge Alesia's intentions appears to be based, at least in part, on a recognition of his jury selection procedures from prior appearances in his courtroom: "We understood how the Court was going to be selecting the jury . . . it is not improper at all to follow this procedure in this case, just as [Judge Alesia] do[es] in every other case where [he] select[s] the jury." Trial Tr. Vol. 1A, at 211 (Feb. 13, 1995). Judge Alesia also referred to his routine procedures in response to defendants' objections: "If there is any misunderstanding—I have done this in ever[y] case I ever tried, and I never got a complaint." *Id.* at 210. Certainly, if defense counsel had actual knowledge of Judge Alesia's routine jury selection procedure (and no reasonable belief that he would deviate therefrom), their claim of impairment would fail. However, in the

absence of this knowledge, Judge Alesia's jury selection routine is irrelevant. A defendant's right to the intelligent exercise of peremptory strikes cannot be forfeited merely because counsel was not, in the absence of uniform rules of the court or actual notice, familiar with a particular judge's unique procedural protocol during jury selection.

B. William Underwood

After conviction on his guilty plea, William Underwood received a two-point reduction from his thirty-four-point base offense level for demonstrating an acceptance of responsibility for his offense under Sentencing Guideline § 3E1.1(a). Underwood also desired, but did not receive, an additional one-point reduction under § 3E1.1(b), which provides:

> If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
>
> > (1) timely providing complete information to the government concerning his own involvement in the offense; or
> >
> > (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,
>
> decrease the offense level by 1 additional level.

U.S.S.G. § 3E1.1(b) (1994).[11] The district court refused this additional one-point reduction. Although the court referred to § 3E1.1(b) generally, its findings went only to subsection (b)(2), holding that Underwood did not timely notify the government of his intention to plead guilty. Underwood does not contest the finding that he did not merit a one-point reduction under subsection (b)(2). Instead, he claims that the court erred because it refused the one-point reduction without addressing whether he was entitled to a reduction under subsection (b)(1) for timely providing complete information regarding his involvement in the offense to the government.

Underwood's argument that the court was obligated in this case to make findings regarding his eligibility for a one-point reduction under subsection (b)(1) fails for one simple reason: Underwood did not make this argument before the district court. We can see no reason to demand that the court address whether Underwood merited a reduction under subsection (b)(1) when Underwood never suggested to the court that he timely provided complete information about his offense to the government, the prerequisite to receiving a reduction under that subsection. The instant case is thus distinguishable from *United States v. Ortiz*, 63 F.3d 952, 955-56 (10th Cir. 1995), relied on by Underwood, in which the Tenth Circuit remanded because the district court failed to make findings on the subsection (b)(1) argument actually made by the defendant. In contrast, although Underwood cited to § 3E1.1(b) as a whole, he argued that he

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[11] The district court used the Sentencing Guidelines that became effective November 1, 1994, the guidelines in effect on the date of sentencing.

qualified for the one-point reduction only on the ground that he timely notified authorities of his intention to plead guilty, which would provide a basis for a reduction only under subsection (b)(2). The court is not obliged to make explicit findings on issues not argued by the defendant. *Compare* Fed. R. Crim. P. 32(c)(1) (requiring district court to make findings on matters controverted by the defendant or to determine that the matter would not affect sentencing).

In any event, the court adopted the findings of the presentence report ("PSR"), which found that Underwood did not timely provide complete information regarding his involvement in the offense, as required by subsection (b)(1). Underwood does not argue on appeal that this finding is clearly erroneous. *United States v. Wetwattana*, 94 F.3d 280, 285 (7th Cir. 1996) ("The district court's acceptance of responsibility determination is a factual finding, which we review for clear error."). If he had, however, we would not be able to find clear error. The PSR's findings support the decision not to reduce Underwood's sentence under subsection (b)(1) and Underwood, who bore the burden of proof, *Wetwattana*, 94 F.3d at 285, presented no contrary evidence. *See, e.g., United States v. Taylor*, 72 F.3d 533, 547 (7th Cir. 1995) (holding district court may rely entirely on factual findings of PSR if defendant does not offer any evidence of its inaccuracy).

III. Conclusion

For the reasons discussed above, we reverse the convictions of Chris Messino, Clement Messino, Dick Messino, and Paul Messino, vacate the sentences and

orders of forfeiture based on those convictions, and remand the case to the district court. Underwood's sentence, which is unaffected by this reversal, is affirmed.

REVERSED and REMANDED in part and AFFIRMED in part.

FLAUM, Circuit Judge, concurring in the judgment.

In this case, although an able and experienced trial judge applied his usual method of jury selection, the defendants were materially misled about the procedure under which they were operating. On these unique facts, to uphold the defendants' convictions would undermine the right to peremptory challenges codified in the Federal Rules of Criminal Procedure. I therefore agree with the majority that the defendants' convictions must be reversed. I am less than sanguine, however, about the continued vitality of *Swain*'s most sweeping rhetoric.[1] For this reason, and because these appeals do not require us to decide the issue, I would not employ this case to endorse a broad rule of automatic reversal, applicable whenever a defendant has suffered an infringement of his right to exercise peremptory challenges.

Two factors convince me that reversal is called for in the present case. First, what occurred below was not merely a technical violation of Rule 24. As Judge Eschbach demonstrates, the defendants were operating under a misapprehension as to the ordering of prospective jurors: "Because defendants had inade-

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[1] The majority cites *Swain* for the proposition that "[t]he denial or impairment of the [peremptory] right is reversible error without a showing of prejudice." 380 U.S. at 219, 85 S. Ct. at 835. Of equal note is the sentence that immediately follows and that serves as the premise underlying the no-prejudice rule: " '[F]or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom or it fails of its full purpose.' " *Id.* (quoting *Lewis v. United States*, 146 U.S. 370, 378, 13 S. Ct. 136, 139, 36 L. Ed. 1011 (1892)) (alteration in original). As I discuss below, with the premise in question, the rule may be suspect.

quate notice of the judge's actual method of ordering potential jurors, their strategic decisions based on a juror's likelihood of sitting on the petit jury were completely subverted." Moreover, it was critical for defense counsel to understand which peremptory strikes were being exercised against whom. Although Rule 24 leaves considerable discretion to the trial court in choosing the precise manner of jury selection, the Rule expressly regulates both the allocation of peremptories and the object of their use: "[A]dditional peremptory challenges [granted for alternate jurors] may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror." Fed. R. Crim. P. 24(c). This explicit limitation only underscores the gravity of the defendants' impairment.

Second, this case does not involve considerations that might warrant more forgiving appellate treatment. *See, e.g., Ross v. Oklahoma*, 487 U.S. 81, 90, 108 S. Ct. 2273, 2279, 101 L. Ed. 2d 80 (1988) ("[T]he concept of a peremptory challenge as a totally free-wheeling right unconstrained by any procedural requirement is difficult to imagine."); *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc) (reaffirming rule of automatic reversal where district court erroneously sustained government's *Batson* challenge to defense's exercise of peremptory). Future claims involving the denial of peremptories will more typically present the factual scenario that divided the Ninth Circuit in *Annigoni*: a district court that has given a wide berth to the Scylla of *Batson* only to crash against the Charybdis of the peremptory prerogative. It is debatable whether

reversal is always mandated in such circumstances. *See Annigoni*, 96 F.3d at 1148 (Leavy, J., dissenting) ("Because the peremptory challenge has changed [post-*Batson*], our review of the trial court's scrutiny of its exercise must change, too."). On the one hand, a trial court applying *Batson* arguably should be left with some margin for error. *See United States v. Annigoni*, 68 F.3d 279, 284 (9th Cir. 1995) (Noonan, J.) ("The reason for this 'substantial latitude' is the danger of the district court being whipsawed—damned if it does and damned if it doesn't."), *rev'd on reh'g*, 96 F.3d 1132 (9th Cir. 1996) (en banc). A too-rigid devotion to the peremptory on the part of appellate courts could have the paradoxical effect of fueling the perception that the right has become an unaffordable luxury, rather than a valuable safeguard of a fair trial. *See Annigoni*, 96 F.3d at 1150 (Kozinski, J., dissenting). In the wake of *Ross*, moreover, it is difficult to argue that the loss of a peremptory is the type of structural defect that necessitates reversal in all cases. *See Annigoni*, 96 F.3d at 1148-49 (Leavy, J., dissenting); *id.* at 1150 (Kozinski, J., dissenting); 68 F.3d at 285 (Noonan, J.). On the other hand, because it is notoriously difficult to estimate the effect of a juror on the outcome of a trial, questions of jury selection tend to defy harmless-error analysis. The prospect that the loss of peremptory challenges will inevitably be considered harmless should cause a court to swallow hard before abandoning a rule of automatic reversal. *See Annigoni*, 96 F.3d at 1150 (Kozinski, J., dissenting). In the instant case, however, we face no such dilemma. No countervailing constitutional imperative led the district court to impinge upon the defendants' right to the exercise of their peremptories; there simply (and

unfortunately) was a critical miscommunication between the bench and bar. Given the significance of the error that occurred here and the lack of any compelling reason to afford expanded latitude to the trial court, this case does not present an occasion to examine whether the denial of peremptory challenges should ever be subject to harmless-error review.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-2155, 95-2925, 95-2926, 95-3052 and 95-3124

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIAM UNDERWOOD, PAUL MESSINO, CHRISTOPHER B. MESSINO, CHRISTOPHER RICHARD MESSINO, AND CLEMENT MESSINO, DEFENDANTS-APPELLANTS

[Filed: Nov. 21, 1997]

Before: CUDAHY, ESCHBACH, and FLAUM, Circuit Judges.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

EASTERBROOK, Circuit Judge, with whom POSNER, Chief Judge, and MANION and EVANS, Circuit Judges, join, dissenting from the denial of rehearing en banc.

The result of a 10-week trial should stand unless the verdict is unreliable. Yet two and a half years after this lengthy trial ended, the panel has set aside the verdicts for the sole reason that defense counsel were confused about the order in which members of the venire were to be seated, and therefore could not make the most advantageous use of their peremptory challenges. The panel did not conclude that this foul-up undermined confidence in the verdict; instead it refused to inquire whether the error was harmless. Quoting dicta in *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759 (1965), that "[t]he denial or impairment of the right is reversible error without a showing of prejudice", the panel continued: "harmless-error analysis is inappropriate where a defendant's statutory right to peremptory challenge has been denied or impaired". *United States v. Underwood*, 122 F.3d 389, 392 (7th Cir. 1997). This approach has the support of *United States v. Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996); *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 158-62 (3d Cir. 1995) (civil case); *Knox v. Collins*, 928 F.2d 657, 661 (5th Cir. 1991) (collateral attack on state conviction); and *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc). But four other courts of appeals have held that an error that causes the defense to lose or waste peremptory challenges may be deemed harmless when, in the language of Fed. R. Crim. P. 52(a), the reduction in the number of available challenges does not affect "substantial rights". See *McQueen v.*

Scroggy, 99 F.3d 1302, 1320-21 (6th Cir. 1996) (collateral attack); *United States v. Horsman*, 114 F.3d 822, 825 (8th Cir. 1997); *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122 (10th Cir. 1995) (civil case); *United States v. Farmer*, 923 F.2d 1557, 1566 & n. 20 (11th Cir. 1991). As the ninth circuit did in *Annigoni*, we should resolve this issue en banc.

Although peremptory challenges are authorized in all federal jury trials, their use is increasingly contested now that *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), has held that prosecutors may object to challenges exercised by the defense. Assessing challenges on the fly yields many claims of error, and other things too can go awry, as they did in the jury selection preceding the Messinos' trial. Today's case starkly presents the question whether harmless-error analysis is necessary; no factual complications or extraneous legal questions impede decision. Our panel recognized that the subject is important, one judge wrote separately to express doubts about the doctrine of automatic reversal, and the conflict among the circuits demonstrates that the problem is common elsewhere. A significant, recurring legal issue is a prime candidate for hearing by the full court. That the panel has decided the issue incorrectly makes rehearing all the more appropriate.

Perfection is elusive. Appellate courts long ago ceased to be citadels of technicality and began to ask whether a particular error implies that the judgment is unreliable. To redo a lengthy trial—to redo it 3 years after the original trial, 5 years after the indictment, 17 years after the drug conspiracy began, as the panel has directed—is to ensure that the outcome will be *less* reliable than it was the first time

even if there are no legal errors. Memories will have faded or become distorted, witnesses will have died, evidence will have vanished. New errors are bound to occur, perhaps more serious than those in the first trial. While the Messinos' second trial occupies the courtroom, other cases will fester in the queue, and litigants innocent of any responsibility for the delay will suffer losses as a result. As usual, the quest for the perfect is the enemy of the good.

The panel approached this issue as if it had to make a decision about wise policy. Should it undertake harmless-error analysis, given the inscrutable effects of missed opportunities in jury selection, or should it insist on error-free implementation of the rules and avoid that task? As an original matter that would be an interesting question. Though I have my doubts about the panel's assessment of the competing goals—judicial review of peremptory challenges after *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), means that there are more errors, and a correspondingly high benefit of a harmless-error rule—the subject is not open to decision as an original matter. Rule 52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." It does not except errors affecting peremptory challenges. *Any* error that does not affect substantial rights *shall* be disregarded. See also 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors which do not affect the substantial rights of the parties."); Fed. R. Civ. P. 61 ("The court at every stage of the proceeding must

disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

Occasionally courts declare that Rule 52(a) and § 2111 just don't apply to one or another right. Fifteen years ago we held that a prosecutorial request to the jury to draw an adverse inference from the defendant's exercise of his privilege against self-incrimination could not be harmless. But the Supreme Court disagreed, holding that Rule 52(a) applies, just as it says, to any error, even one of constitutional dimension. *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983). Despite *Hasting*, another court of appeals soon held that misjoinder never could be harmless because it is "inherently prejudicial". Again the Court reversed, holding that Rule 52(a) must be applied across the board. *United States v. Lane*, 474 U.S. 438, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986). Soon a conflict among the circuits developed on the question whether a court of appeals could assert a supervisory power to reverse without a harmless-error analysis. Yet again the Supreme Court disapproved, writing that "federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255, 108 S. Ct. 2369, 2373-74, 101 L. Ed. 2d 228 (1988).

Our panel did not discuss or even cite Rule 52(a), § 2111, *Hasting*, *Lane*, or *Bank of Nova Scotia*. Nor did it acknowledge any of the four recent appellate decisions employing the harmless-error rule. The panel's treatment of authority is the norm among appellate courts that refuse to use a harmless-error

approach when dealing with peremptory challenges. The following table illustrates:

	Discussion or citation of. . .				
Case	Rule 52/61	§ 2111	*Hasting*	*Lane*	*Nova Scotia*
Taylor	N	N	N	N	N
Kirk	N	N	N	N	N
Knox	N	N	N	N	N
Underwood	N	N	N	N	N
Annigoni	Y	N	N	N	N

The solitary Y in this table means that the ninth circuit addressed Rule 52(a) in *Annigoni*. But in doing so it adopted a line of argument that the Supreme Court soon disapproved in *Johnson v. United States*, — U.S. —, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

Annigoni distinguished "classic trial error," which it said was the domain of Rule 52(a), from "structural error," which it thought led to automatic reversal. 96 F.3d at 1143. After concluding that an improper rejection of a peremptory challenge is not "trial error" because it occurs before the presentation of evidence begins, 96 F.3d at 1144, and that its effect is hard to assess, the ninth circuit concluded that harmless-error analysis need not be undertaken. Now this approach has a lot of trouble with *Lane* and *Bank of Nova Scotia*, each of which involved hard-to-evaluate errors that preceded the trial (misjoinder in *Lane*, defective indictment in *Bank of Nova Scotia*). Let that pass. The deeper

problem is that Rule 52(a) does not permit courts to distinguish "trial" from "structural" errors. "*Any* error, defect, irregularity or variance which does not affect substantial rights *shall be* disregarded." About the time it decided *Annigoni*, the ninth circuit held that Rule 52(b)—the plain-error companion to the harmless-error doctrine—likewise is limited to "trial" errors, and that "structural" errors always require reversal. *United States v. Keys*, 95 F.3d 874 (9th Cir. 1996) (en banc). The Supreme Court replied in *Johnson*, — U.S. at —, 117 S. Ct. at 1548:

> Petitioner argues that she need not fall within the "limited" and "circumscribed" strictures of [*United States v.*] *Olano*[, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)], because the error she complains of here is "structural," and so is outside Rule 52(b) altogether. But the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure. None of the cases discussing "structural error," upon which petitioner relies, were direct appeals from judgments of conviction in the federal system. Several came from state courts which had considered the claimed error under their own rules. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Others came here by way of federal habeas challenges to state convictions. See *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d

122 (1984). None of them were subject to the provisions of Rule 52.

But it is that Rule which by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. We cautioned against any unwarranted expansion of Rule 52(b) in *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), because it "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed,'" *id.*, at 15, 105 S. Ct. at 1046 (quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S. Ct. 1584, 1592, 71 L. Ed. 2d 816 (1982)). Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make. See *Carlisle v. United States*, 517 U.S. 416, ——, 116 S. Ct. 1460, 1466, 134 L. Ed. 2d 613 (1996).

In other words: Rule 52 governs every issue in all federal criminal prosecutions; a distinction between "trial" and "structural" error is appropriate only in state cases, to which Rule 52 does not apply; judges have "no authority" to make exceptions to Rule 52. The Court followed up by vacating *United States v. Keys*, — U.S. —, 117 S. Ct. 1816, 137 L. Ed. 2d 1025 (1997). Although certiorari was not sought in *Annigoni*, its foundation has been washed away. Yet our panel followed *Annigoni* without discussing *Johnson*.

Before taking up Rule 52, *Annigoni* asserted: "Given the obvious importance of the right of peremptory challenge, a criminal defendant has long had

a powerful remedy for the impairment or denial of this right: automatic reversal of the conviction." 96 F.3d at 1141. For this proposition it cited *Harrison v. United States*, 163 U.S. 140, 142, 16 S. Ct. 961, 961, 41 L. Ed. 104 (1896); *Gulf, Colorado & Santa Fe Ry. v. Shane*, 157 U.S. 348, 351, 15 S. Ct. 641, 642, 39 L. Ed. 727 (1895); and *Lewis v. United States*, 146 U.S. 370, 376, 13 S. Ct. 136, 138, 36 L. Ed. 1011 (1892). These cases have one essential feature in common: they were decided more than a century ago, during the Bad Old Days when appellate courts reversed for any error. It is exactly this inflexibility that § 2111 and Rule 52(a) jettison. All doubt was stilled in *Lane*:

> The Court of Appeals held that misjoinder "is inherently prejudicial." . . . The Circuits are divided on the question whether misjoinder requires automatic reversal, or whether the harmless-error rule governs. Most Circuits that have adopted the *per se* approach have relied on *McElroy v. United States*, 164 U.S. 76, 17 S. Ct. 31, 41 L. Ed. 355 (1896), where this Court applied the joinder statute then in force and reversed convictions of jointly tried defendants after rejecting the Government's argument that there was no showing of prejudice. *Id.*, at 81, 17 S. Ct. at 33.
>
> *McElroy*, however, was decided long before the adoption of Federal Rules of Criminal Procedure 8 and 52, and prior to the enactment of the harmless error statute, 28 U.S.C. § 2111, which provides that on appeal we are to ignore "errors or defects which do not affect the substantial rights of the parties." Under Rule 52(a), we are similarly

> instructed that any error "which does not affect substantial rights shall be disregarded."

474 U.S. at 444-45, 106 S. Ct. at 729 (footnotes omitted). *McElroy* is of a piece with *Harrison*, *Shane*, and *Lewis*. Their approach is defunct—terminated for federal cases by statute and rule, for state cases by *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and its successors, such as *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). To overthrow the automatic-reversal rule of one exemplar is to overthrow that approach altogether. Yet *Annigoni* did not cite or discuss *Lane*. Neither did our panel.

Swain, the solitary decision of the Supreme Court on which the panel relied, offers poor support for automatic reversal. The brief passage that the panel quoted was dictum based on *Harrison*, *Shane*, and *Lewis*. Swain did not contend that he had been deprived of a peremptory challenge. He attacked the prosecutor's challenges and lost on the merits. Two years later, *Chapman* changed the landscape for cases coming from state courts—as § 2111 and Rule 52 had done for cases in the federal courts. *Johnson* holds that the Court's approach to the review of state judgments (of which *Swain* was one) is not instructive in federal prosecutions. Then there is the fact that *Batson* overruled *Swain*. If the doctrine of automatic reversal ever had a foundation, it was that peremptory challenges are, well, peremptory, to be exercised in the parties' unfettered discretion, and that harmless-error analysis is a form of judicial inquiry into the utility of a challenge. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails

of its full purpose." *Lewis*, 146 U.S. at 378, 13 S. Ct. at 139, quoted in *Swain*, 380 U.S. at 219, 85 S. Ct. at 835. After *Batson* and *McCollum*, however, peremptory challenges are subject to judicial control, and there is no more support for automatic reversal than there is when the judge resolves any of the thousand other issues that influence the conduct of the trial.

I have lavished attention on *Annigoni* because it is the most detailed of the panel's precursors. The other three recent appellate decisions announcing support for automatic reversal add nothing of value. As the table shows, none of them discusses § 2111, Rule 52(a) (or Fed. R. Civ. P. 61), or any of the important decisions of the Supreme Court. *Taylor* tossed off a single unreasoned sentence; like *Swain*, the passage in *Taylor* is dictum, for the court held that there had been no error. *Kirk* invokes *Harrison*, *Shane*, and *Lewis* in addition to *Swain*'s dictum and does not offer an independent justification of its conclusion. *Knox* is a collateral attack on a state conviction, to which Rule 52 does not apply. It says that defendants have a constitutional right to peremptory challenges, and that harmless-error analysis is "accordingly" inapplicable. 928 F.2d at 661. Both the premise and the conclusion of *Knox* are untenable. The *constitutional* right is to an impartial jury, not to remove members of the venire who the judge rightly concludes could render an unbiased verdict. *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 2278, 101 L. Ed. 2d 80 (1988) (the right to peremptory challenges is "not of constitutional dimension"); accord, *McCollum*, supra; cf. *United States v. Boyd*, 86 F.3d 719 (7th Cir. 1996). Anyway, *Hasting* and *Chapman* show

that the constitutional footing of a right does not preclude a harmless-error inquiry. Other cases, such as *United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979), and *United States v. Rucker*, 557 F.2d 1046, 1048-49 (4th Cir. 1977), that announced an automatic-reversal rule before *Hasting*, *Lane*, *Bank of Nova Scotia*, *Batson*, *McCollum*, and *Ross*, do not require any additional comment.

One final possibility: perhaps § 2111 and Rule 52(a) apply, but an error concerning a peremptory challenge *always* affects a "substantial right". A right is "substantial" when it is one of the pillars of a fair trial. Trial before an orangutan, or the grant of summary judgment against the accused in a criminal case, would deprive the defendant of a "substantial" right even if it were certain that a jury would convict. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081-82, 124 L. Ed. 2d 182 (1993); cf. *California v. Roy*, — U.S. —, 117 S. Ct. 337, 136 L. Ed. 2d 266 (1996). For the same reason, a biased tribunal always deprives the accused of a substantial right. *Bracy v. Gramley*, — U.S. —, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997); *Cartalino v. Washington*, 122 F.3d 8 (7th Cir. 1997). See also *Gomez v. United States*, 490 U.S. 858, 876, 109 S. Ct. 2237, 2248, 104 L. Ed. 2d 923 (1989) (decision by an unauthorized tribunal deprives the defendant of a substantial right). Deprivation of counsel likewise so undermines the ability to distinguish the guilty from the innocent that it always leads to reversal. See *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 2046-47, 80 L. Ed. 2d 657 (1984); *Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994). After *McCollum* and *Ross*, however, it is impossible to group an error concerning peremptory

challenges with the denial of counsel or trial before a bribed judge. If the jury that actually sits is impartial, the defendant has enjoyed the *substantial* right. A reduction in the number of peremptory challenges from 10, the number Fed. R. Crim. P. 24(b) now provides in felony cases, to 3, the number it makes available in misdemeanors, could not be called a "deprivation" of a "substantial" right; indeed, after *McCollum* even the abrogation of peremptory challenges could not be so labeled. Many thoughtful persons, including one Justice of the Supreme Court, see *Batson*, 476 U.S. at 107-08, 106 S. Ct. at 1728-29 (Marshall, J., concurring), have called for the abolition of peremptory challenges, which are unknown in most legal systems outside the United States. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries. What was designed as a buffer zone to enable litigants to avoid jurors whose impartiality is in question, but not enough to support a challenge for cause, has become an invitation to racial (and other) discrimination, see *McCollum* and *Batson*, and a mechanism used by both sides to skew the jury in one's favor by removing members of the venire whose very impartiality is seen by the litigant as an obstacle to be overcome. Because these efforts offset each other, and it is hard to predict jurors' votes, litigants rarely succeed in producing a more favorable panel. See Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L.Rev. 491 (1978); *Symposium on the Selection*

and Function of the Modern Jury, 40 American L. Rev. (Win.1991). It is therefore inconceivable that if the defendant freely exercises 8, or 5, or 3, peremptory challenges, rather than 10, any "substantial" right has been lost. Cases such as *United States v. Magana*, 118 F.3d 1173, 1206 (7th Cir. 1997), and *United States v. Farmer*, 924 F.2d 647, 653 (7th Cir. 1991), which say that it is within the judge's discretion to provide or withhold additional peremptory challenges in multi-defendant cases, recognize that a small change in the number of peremptory challenges does not affect litigants' vital interests. Cf. *United States v. Cambara*, 902 F.2d 144, 147-48 (1st Cir. 1990) (an erroneous deprivation of an extra peremptory challenge awarded under Rule 24(b) may be deemed harmless).

In any given case there remains the possibility that a blunder affects a right that is substantial in the sense of *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946): that the error "had substantial and injurious effect or influence in determining the jury's verdict". 328 U.S. at 776, 66 S. Ct. at 1253. See also *O'Neal v. McAninch*, 513 U.S. 432, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995). In a trial like this, the possibility that lawyers' confusion in the exercise of peremptory challenges altered the outcome is too remote to be worth investigating. The confusion affected only two members of the venire—one of whom was objectionable to just one attorney (whose clients were acquitted), and the other of whom the defense deemed an acceptable alternate juror. Perhaps it is impossible to show that the loss or disallowance of a peremptory challenge affected the outcome of a trial—but inability to trace adverse

effects to a mistake does not justify reversing a conviction; it shows instead that there is no warrant for disturbing the judgment. *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981).

Whether harmless-error analysis is essential is a subject well worth the time of the court en banc. The question has arisen in almost every circuit; it is bound to come up more frequently now that *McCollum* requires judges to scrutinize defendants' and prosecutors' challenges alike; and the Supreme Court seems to have had trouble finding an appropriate case in which to resolve the conflict among the circuits, so the issue may be in our own bailiwick for a while. My colleagues' willingness to leave our circuit in the wrong camp pending that resolution is regrettable.